Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

STEVEN J. HENRY,

Petitioner,

vs.

STATE OF MONTANA, TOWN OF DARBY,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

STEVEN J. HENRY, Pro Se
P.O. Box 805
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QUESTIONS PRESENTED

WHEN A DARBY MONTANA JUDGE OPENLY DENIES THE PETITIONER THE RIGHT TO THE COUNCIL OF HIS CHOICE AND FURTHERMORE, TOTALLY DENIES THE PETITIONER THE RIGHT TO BE ACCOMPANIED BY ANY LEGAL COUNCIL WHATSOEVER DURING A JURY TRIAL, DOES THE MONTANA SUPREME COURT HAVE THE LEGAL AUTHORITY TO SANCTION THIS DIRECT VIOLATION OF THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION? LIKEWISE, IS IT LAWFUL FOR THE MONTANA SUPREME COURT TO UPHOLD THE ILLEGALITY OF A VERY DAMAGING THIRD PARTY SIDING WITH THE PROSECUTION TO FREELY MINGLE WITH AND TO ADDRESS THE JURORS WHILE ON BREAK BEFORE THE DELIBERATION?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 7

CONCLUSION 16

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) 12

Gideon v. Wainwright, 373 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) 4

Poindexter v. State, 183 Tenn. 191, S.W.2d 445 (1946) 12

United States v. Phillips, 699 F.2d 798 (1983 CA6 Mich) 12

United States v. Rad-O-Lite of Philadelphia, 612 F.2d 740 (1979) 4

MONTANA CODE ANNOTATED:

25-31-601 MCA 4, 8, 11, 13

37-61-210 MCA 5, 8, 13

46-16-501 MCA 9

UNITED STATES CONSTITUTION:

Fifth Amendment 1, 10, 14, 15, 16

Sixth Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

Fourteenth Amendment, Sec. I 2

OPINIONS BELOW

The Supreme Court of Montana's opinion, filed on June 20th, 1995, is attached as Appendix 1, followed by the opinion of the District Court and the opinion of the Darby City Court.

JURISDICTION

The Supreme Court of the State of Montana issued its final decision in this matter on July 13, 1995. The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Montana is invoked under 28 U.S.C. §1257, which states, in part, the final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

UNITED STATES CONSTITUTIONAL AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

UNITED STATES CONSTITUTION
AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MONTANA CONSTITUTION
ARTICLE II, SECTION 24

Rights of the accused. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

STATEMENT OF THE CASE

Unfortunately the judicial system in the State of Montana, and especially in Ravalli County is in the hands of a bench-bar monopoly, in which a person charged with any type of infraction rarely is found innocent. The justice system is a political system.

Judge Bethel arrogantly defies the law as it is written, as she is an ADL advocate (Anti-Defamation League), and anyone who is disliked publicly becomes a victim in her court. She bases most of her judgments upon what is written in the local newspaper, The Ravalli Republic. Bethel new to well, that Mr. Henry had the right by Montana Statute to have his friend defend him in a lower court of no record. She also knew that Mr. Roche had a legal background, and would more than likely win the case for Henry. The prosecutor, Charles Recht also knew this for a fact. This is why the elimination of Mr. Roche

was all-important in the plan of the prosecutor, who sold Bethel on the idea of forbidding Roche to represent Henry. In otherwords, Bethel defied Montana Law in favor of a very tainted attorney, and Town Attorney of Darby, Montana. for 20 years, never losing a case. Again, Roche not being an attorney, eliminated the possibility of Mr. Recht dealing with Mr. Roche. Recht also knew that Mr. Henry was innocent, but his unblemished record was at stake, and Henry had to suffer. Bethel, an unschooled in the law, former housewife, went along with Recht, and threw her oath of office out the window. "To uphold the Constitution of the United States, and of the State of Montana . . . " She never thought the Petitioner would pursue the case this far, even though it is only a misdemeanor.

> Purpose of the Sixth Amendment guarantee is the right to counsel to insure that the accused will not suffer adverse judgment or to lose benefit of procedural protection because of ignorance of the law. *United States v. Rad-O-Lite of Philadelphia (1979 CA3 Pa) 612 F.2d 740.*

> Sixth Amendment provision guaranteeing accused rights to assistance of counsel for his defense is made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).*

> *25-31-601 MCA, Who may Act as Attorney.* "Parties in Justice Court may appear and act in person, or by attorney; and any person except for the constable by whom the summons was served may act as attorney."

> *37-61-210 MCA. Penalty for practicing law without a license.* "If any person practices law in any court, except justice and city courts without having received a license as attorney or counselor is guilty of contempt of court.

The decision of Judge Bethel to deny the above mentioned rights of the accused, not only defiled the Bill of Rights, but the Fourteenth Amendment, and the Montana Code. The sad fact of the matter is that the Montana Supreme Court attempted to justify her acts.

The city and justice courts are "courts of no record" in the State of Montana. But Mr. Henry ordered at his own expense, a court reporter to take down the proceedings in Judge Bethel's Darby Court. Fortunately, there is a record of the violations submitted to the Montana Supreme Court, which they chose to overlook. Bethel denied the Petitioner legal counsel, but she did it on the record.

The facts belie the circumstances painted by the City of Darby, the Ravalli County District Court, and the Montana Supreme Court.

A. The Petitioner has been politically persecuted by the Town of Darby, Officer Larry Rose, Town Attorney Charles Recht, and Judge Martha Bethel. This is due to the fact that Mr. Henry opposed vigorously the transplanting of outside children into the Darby School District, where he is a taxpayer. His efforts brought the measure down to defeat. Town Attorney Charles Recht lead the bill to bring the children into a school district which could not afford such a move. Darby is a small town in Montana, with a small tax base.

B. The DUI charge against Mr. Henry was made by Officer Larry Rose, the solitary policeman at the time in Darby. He arrested the Petitioner without cause, and revoked his license to drive for 90 days, which is permitted by Montana Law. Henry was not under the influence, nor was he driving his car at the time of the arrest. To make things more ridiculous, Rose was not in his Darby Town jurisdiction, which was never established to the contrary by the prosecution. Tapes submitted by the defense of the Darby Town Limits were never reviewed by the Montana Supreme Court, and never brought into evidence by Howard Greenwood, Defense Attorney, at the Ravalli District court trial. More evidence of a judicial set up.

C. The Montana judicial system is a "closed circuit". When they decide to prosecute a person, everyone in power in the state judiciary gangs up to make sure the person suffers. It has been this way for many years. It gives attorneys the power to decide court cases, as the judges go along with the prosecution all the time. Jurys are picked by the County Clerk and Recorder for their political beliefs, not randomly from the tax roles, i.e. the Montana Attorney General entered this case.

D. For justice to be served in this case, it must be moved out of the State of Montana to the high Court. Although the law of the State of Montana states, "misdemeanors demand a stay of execution on appeal", Judge Jeffrey Langton of the Ravalli District court wants to jail the Petitioner before his appeal to the United States Supreme Court is filed. A Notice of Appeals to the Montana Supreme Court was filed on July 18, 1995. Yet, through retaliation, and sheer mean spiritedness, Langton wants

to usurp the Montana Law to serve his own arrogant ways. In essence, the Montana judicial system fears the United States Supreme Court, as they are known to uphold the civil and constitutional rights of the people.

E. The Petitioner has pursued this case to the nation's Highest Court, as he has maintained his innocence throughout its stages. The Montana Courts have denied him his civil and constitutional rights. From the lower Court in Darby, Montana, to the Montana Supreme Court, each and every member of the Montana Bench-bar monopoly have covered for one another. Although this case has varied violations, stretching from Darby Town Court, to the Montana Supreme Court, the most blatent of all would have to be *denial of legal counsel* by Judge Bethel in Darby.

REASONS FOR GRANTING THE WRIT

COMES NOW the Petitioner, STEVEN J. HENRY, acting in his own behalf, to bring before this entitled Court his Petition for Certiorari.

After exhausting all State remedies, this Petition is in appeal to the decision of the Montana Supreme Court. (Montana Supreme Court Case No. 94-400.)

Pursuant to Rule 14 of the United States Supreme Court, the Petition is in accordance with the jurisdictional succession for remedies sought by the Petitioner. The United States Supreme Court is the entitled Court of jurisdiction.

The case and presentation is divided into three instances. The Darby Town Court, the Ravalli County District Court, and the Montana Supreme Court.

Pursuant to Rule 14(a) the Petitioner is presenting for review the terms and circumstances of the case.

The State of Montana does not have a Court of Appeals, as the Supreme Court of the State is the only appeals court of higher jurisdiction.

Basically the case in its first instance was heard in the Darby City Court of Judge Martha A. Bethel. In all courts of lower jurisdiction in Montana, pursuant to 25-31-601 and 37-61-210 of the Montana Code Annotated (copy of statutes are enclosed) anyone may act as attorney in Justice, City, and Municipal Courts. The Petitioner designated his friend, WILLIAM W. ROCHE as his counsel in the Darby City Case. (Case No. 93-021). The Judge, Martha Bethel, refused Mr. Henry his right to have Mr. Roche as his Counsel. Furthermore, Bethel also refused Mr. Henry a continuance to seek other counsel. This action on the part of Judge Bethel left the Petitioner defenseless, as four days, two of which were weekend days were left until the trial. As a result, the Defendant-Petitioner was found guilty, without any defense whatsoever. The case was a DUI case, of which the Petitioner was not driving, nor was he in a drunk condition. The case in its first instance, the Petitioner was denied his right to counsel in a criminal case. A violation of his *Sixth Amendment Rights*. In her abusing her judicial power, by forbidding Mr. Roche to defend his friend, Judge Bethel violated Mr. Henry's *Fourteenth Amendment* as it pertains to the states. Furthermore, Bethel, by her abusing the

power of judicial authority, violated *42 U.S.C.S. § 1983 of the Federal Civil Rights Acts.*

The question is posed. Did Martha Bethel, Darby City Judge have the right to deny the Petitioner his right to legal counsel? And did Judge Bethel have the right to deny the Petitioner a continuance to seek other counsel? Did Judge Bethel abuse her authority in forcing the Petitioner to enter a trial defenseless?

The second instance of this case, a misdemeanor, was the Montana version of an appeal to the District Court. This was a politically motivated trial that saw the prosecution bring the woman, NANCY JOVIN, the local DUI task force Director to talk to the jurors on the taboos of DUI, even before the jury deliberated. The Judge, Jeffrey Langton saw this action and did nothing to stop the illegal intermingling of Ms. Jovin with the jury. This action of "jury tampering" was ignored by both the Defense Attorney, Howard Greenwood, and Judge Langton. The Court by its silence gave admonition to the action in violation of *46-16-501(l) Montana Code Annotated. The jury may not converse about the case among themselves, nor with anyone else on the subject of the trial.* The affidavit of Robert Henry witnessing the action of Ms. Jovin attests to the fact of wrongdoing.

The District Court Judge Jeffrey Langton did violate the Defendant-Petitioner's right of Equal Rights Under The Law provided in the Fourteenth Amendment to the United States Constitution. Judge Langton's sentence against the Petitioner was illegal, as the normal sentence for a first time DUI in Montana is 2 days in jail and a $350 fine. Langton fined Mr. Henry 60 days in jail, and $10,000

in fines. He charged the Petitioner costs of the prosecutor, and cost of the jury.

The question is: Did Judge Langton have the right to allow the prosecution to violate the Fifth and Sixth Amendment Rights of the Petitioner by permitting the DUI Task Force Director to address the jury before their deliberation?

Did Judge Langton by law, have the right to exorbitantly fine the Petitioner for his own prosecution? Did the Judge have the right to deny Mr. Henry the right afforded any other charged misdemeanor offender, the right of consistency of "equal sentencing?"

The violations of the Petitioner's Civil and Constitutional Rights were overlooked by the politically motivated Montana Supreme Court inasmuch as they attempted to justify the errors committed by the Darby City Court, and the Ravalli District Court. (See the Opinion and Order of the Montana Supreme Court, and the Denial for Reconsideration enclosed.)

Did the Montana Supreme Court have the right to act in accordance with the violations made by the two lower courts? Did the Montana Supreme Court have the right to justify the violations of denial of defense counsel made by the Bethel Darby Court?

Did the Montana Supreme Court correctly assess the fact that the arrest of the Petitioner was done outside the jurisdiction of the Town of Darby? And did they correctly look into the fact that the Petitioner was not read his rights, as guaranteed by the Miranda Act?

Did the Montana Supreme Court address the presence of the Montana DUI Task Force Director, Nancy Jovin conversing openly with the jury before deliberation of the jurors in the Ravalli County District Court case?

Pursuant to the Rules of the Supreme Court the Petitioner, STEVEN J. HENRY hereby submits his concise synopsis of the case, and the violations committed against him by the Court of the City of Darby, Montana, Judge Martha Bethel presiding.

1. Martha Bethel did with malice, deny the Petitioner his right to legal counsel in a "kangaroo trial" which took place in Darby, Montana. Bethel did deny Mr. Henry the right to be defended by his friend, William W. Roche pursuant to 25-31-601 Montana Code Annotated, and 37-61-210 MCA. Martha Bethel, a lay person, working under the auspices of the Darby Town Attorney, Charles Recht, knew she was violating the rights of Steven Henry. What is more, she was violating the rights of Mr. Roche as well, as he had the right to defend his friend. See Copies of statutes enclosed.

2. The attorney representing the Petitioner at his trial de novo in Ravalli District Court, HOWARD GREENWOOD, was requested to represent Mr. Henry in Mr. Roche's stead. Greenwood was out of town at the time. The Petitioner then requested a continuance to secure counsel, and he was denied by Bethel. In otherwords, Judge Bethel set up a "railroading" of the Petitioner, making him defend himself, of which he had no chance of winning a bogus case. This was the plan of Martha Bethel, and cohort in the Darby system, Charles Recht.

3. So, not only did Judge Bethel deny Mr. Henry his right by law to have his friend defend him, but also denied him a continuance to seek other counsel. In essence, she completely denied Henry his right to counsel. A violation of the *Sixth Amendment to the United States Constitution,* and a violation of *Section 24 of the Montana Constitution.*

> Prosecution has no right to deny defendant representation by counsel of the defendant's choice in the absence of showing that some important interest will be adversely affected by permitting chosen counsel to proceed. *United States v. Phillips (1983 CA6 Mich.) 699 F.2d 798.*
>
> Fundamental right of accused to representation by counsel must not be denied or unreasonably restricted. *Poindexter v. State (1946) 183 Tenn 193, 191 S.W.2d 445.*
>
> Accused right to counsel under the *Federal Constitution – Supreme Court cases. 2 L. Ed. 2d 1644, 9 L. Ed. 2d 1260, 18 L. Ed. 2d 1420.*
>
> Sixth Amendment provision guaranteeing accused right to assistance of counsel for his defense is made obligatory upon states by the *Fourteenth Amendment, Chambers v. Mississippi (1973) 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038.*

4. The violations of the Sixth Amendments rights of the Defendant in the District Court trial de novo in the second instance was not pleaded by the Defense Attorney, Howard Greenwood. This oversight was deliberate by the attorney Greenwood, as later it was found he and the Prosecutor Recht, are fellow Mormon Bishops. A Civil

suit against Greenwood is now in Federal District Court – Class Action CV 95-40-M-CC1.

5. In the third instance, the Montana Supreme Court, in a sophmoric manner attempted to justify Bethel's violation of Mr. Henry's right to legal counsel by Karla Gray's opinion, "we decline to address the merits of Mr. Henry's argument, as the trial de novo justified the error, and cured any prejudice." Is Justice Gray saying, "the violation of the Sixth Amendment rights of Mr. Henry was O.K. because there was an appeal?" There would have not been a trial do novo if Judge Bethel had not denied the Petitioner's right to counsel. The efforts at justification of Bethel's actions are politically motivated by the Montana Supreme Court. A court which has the lowest overturn ratio in the United States. (Less than 1% overturn from the District Courts). Nor did Justice Gray rule that Bethel was right in denying legal counsel to Henry. Neither did she say that Bethel had the right to deny the Petitioner a continuance to seek other counsel. It appears in the Montana Supreme Court's Opinion and Order, that instead of their being unbiased body, addressing the issues presented in the appeal of Mr. Henry, they pleaded the case for the prosecution.

The segment of this writ dealing with the blatent violation of the Petitioner's right to legal counsel with these very ponderous questions:

1. Did Judge Bethel have the right to deny the Petitioner legal counsel of his choice, legally maintained? See 25-31-601 MCA, 37-61-210 MCA.

2. Did the Supreme Court not skirt the issue of Judge Bethel denying the Defendant in her Court a continuance to seek other counsel?
3. Why did the Montana Supreme Court avoid the fact that William Roche did in fact have the right to defend his friend?
4. Why did the Montana Supreme Court not approach the issue of jury tampering on the part of Nancy Jovin, DUI Task Force Director?
5. Why did the Montana Supreme Court sidestep the issue of faulty representation on the part of his attorney, Howard Greenwood knowing full well that the Defense Attorney failed to bring out the Sixth Amendment violations in Bethel's Court, to the Judge in the Ravalli District Court trial.

The Petitioner's right to Due process of Law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and his right to counsel guaranteed by the Sixth Amendment to the United States Constitution and the twenty Fourth Section of the Second Article of the Montana Constitution, were violated by the Montana Supreme Court's failure to overturn the Petitioner's conviction in cause No. 94-400.

The petitioner was initially convicted of operating a motor vehicle under the influence of alcohol in the Darby City Court on February 16, 1994, requested a trial de novo in District Court, and was subsequently convicted at the District Court trial. Allegations of error at both the City Court trial and the District Court Trial were made to the Montana Supreme Court. The Montana Supreme Court failed to address any of the Petitioner's allegations of

error related to the Darby City Court trial, based on the fact that the Petitioner subsequently had a trial de novo in District Court which would have cured any prejudice at the City Court trial. However, the Montana Supreme Court allowed to stand conditions of the Petitioner's suspended sentence which included the costs of incarceration and jury costs totaling $1,939.50. In addition, the Montana Supreme Court dismissed the Petitioner's allegations of ineffective assistance of counsel at his District Court trial.

The record clearly reflects that the Petitioner was denied the assistance of counsel at his City Court trial. Although the Montana Supreme Court held that these deficiencies were cured by the subsequent District Court trial, it allowed to stand costs assessed against the Petitioner that would not have been incurred had he been afforded a fair trial in the Darby City court. The constitutional requirement that the petitioner be afforded the assistance of counsel in all criminal prosecutions is not qualified. The Petitioner's right to counsel was violated, and no subsequent process is capable of curing such a denial. Further, the Montana Supreme Court's failure to address the defects in the City Court trial, and overturn his conviction based upon these defects, resulted in the Petitioner being fined nearly two thousand dollars for "costs" in addition to his fine. The loss of this substantial amount of property without being afforded a review of the defects in the proceedings that ultimately led to the assessment of jury costs and costs of incarceration, deprived the Petitioner of the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

The Petitioner contends, in addition, that the Montana Supreme Court's determination that the ineffective nature of the assistance provided by the Petitioner's counsel at the District Court trial was clearly erroneous. Counsel's failure to raise the issue of the denial of counsel in the prior court proceedings, along with his failure to introduce evidence of lack of the arresting officer's jurisdiction, indicated that his representation fell below the acceptable standards for representation by an attorney. The result was that the Petitioner was denied the right to assistance of counsel guaranteed by both the United States and Montana Constitutions. Further, the Montana Supreme Court's failure to address the issues of jury tampering by the Montana DUI Task Force Director, and collusion between the Petitioner's attorney and Prosecutor Recht, resulted in a review process that was fundamentally unfair, and violative of the Petitioner's right to due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

The Montana Supreme Court's failure to address the errors made by the Darby City court, their conclusion that the Petitioner's right to counsel was not violated by the ineffective assistance provided by his attorney in District Court, and their failure to address the issues of jury tampering and collusion between the prosecutor and the Petitioner's attorney, deprived the Petition of his right to the assistance of counsel guaranteed by the United States and Montana Constitutions, and his right to

due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

The Petitioner respectfully seeks relief from the United States Supreme Court in the form of a judicial overturn in the decision handed down by the Montana Supreme Court. The upholding of the lower Court's decisions, and the attempt at justification of Judge Bethel's decision adds insult to judicial injury.

The Petitioner asks no monetary recompence in this case, merely justice that is not to be had in Montana.

This petition is respectfully submitted this 9th day of August 1995 and is being resubmitted on the 4th day of December, 1995.

Respectfully submitted,

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APPENDIX

Page

Appendix

A .....App. 1
B.....App. 13
C .....App. 19
D .....App. 22
E.....App. 24
F.....App. 26

APPENDIX A

No. 94-400

IN THE SUPREME COURT OF THE
STATE OF MONTANA
1995

STATE OF MONTANA, TOWN OF DARBY,

Plaintiffs and Respondents,

-vs-

STEVEN J. HENRY,

Defendant and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District, In and for the County of Ravalli,
The Honorable Jeffrey H. Langton, Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Steven J. Henry, Darby, Montana, Pro Se
For Respondent:
Hon. Joseph P. Mazurek, Attorney General, John Paulson, Ass't Attorney General, Helena, Montana
Charles H. Recht, Attorney at Law, Hamilton, Montana

Submitted on Briefs: March 23, 1995

Decided: June 20, 1995

(Filed Jun. 20, 1995)

/s/ Ed Smith
Clerk

Justice Karla M. Gray delivered the Opinion of the Court.

Steven J. Henry (Henry) appeals from a jury verdict in the Twenty-First Judicial District Court, Ravalli County, finding him guilty of driving or being in actual physical control of a vehicle while under the influence of alcohol or drugs pursuant to § 61-8-401, MCA, and from that portion of the District Court's judgment requiring him to pay legal fees incurred by the Town of Darby. We affirm in part, reverse in part, and remand.

On August 25, 1993, Darby police officer Larry Rose (Rose) received two calls from the Ravalli County Sheriff's Department reporting that Henry had been observed driving on U.S. Highway 93 south of Darby and that he might be intoxicated. Rose patrolled the general area and, while parked on the side of Highway 93, observed Henry's car being driven in an erratic manner. Rose pursued Henry and turned on his emergency flashers just as Henry pulled into a convenience store parking lot. Upon approaching Henry's car, Rose smelled alcohol and observed that Henry appeared intoxicated. Rose requested that Henry perform field sobriety maneuvers; Henry refused to perform two of the maneuvers and could not perform the third. Rose arrested Henry for driving under the influence and transported him to the Ravalli County Jail.

A jury trial was held in Darby City Court on February 16, 1994; the jury found Henry guilty of operating a motor vehicle under the influence of alcohol. The court sentenced Henry to sixty days in jail with thirty days suspended, assessed fines and costs totalling $1,773.32,

and required Henry to complete Ravalli County's alcohol information and treatment program. Henry appealed to the District Court for a trial de novo.

A jury trial held in the District Court on June 30, and July 1, 1994 resulted in another guilty verdict. Following a sentencing hearing, the District Court entered a judgment sentencing Henry to sixty days in the Ravalli County jail with thirty days suspended on certain conditions. Among other things, the conditions required Henry to complete the alcohol program and to pay various fees and penalties, including legal fees incurred by Darby in the prosecution of Henry's case in both the Darby City Court and the District Court. The legal fees total $10,550. Henry appeals. Additional facts are included as necessary in our discussion of the issues.

1. Was Henry denied his right to counsel in the Darby City Court proceedings?

Henry asserts that the Darby City Court erred in determining that William Roche (Roche), a friend of Henry's family, could not represent Henry in criminal proceedings. He argues that §§ 25-31-601 and 37-61-210, MCA, required the court to permit Roche to act as counsel and that its failure to do so violated his right to counsel. We decline to address the merits of Henry's argument because the trial de novo on appeal to the District Court, during which Henry was represented by counsel, cured any prejudice which may have resulted from the City Court's decision regarding representation by Roche. *See* City of Billings v. McCarvel (1993), 262 Mon. 96, 101, 863 P.2d 441, 445.

2. Was Henry denied the effective assistance of counsel in the District Court proceedings?

Henry advances various allegations of improper representation by his defense counsel during trial in the District Court. He argues that defense counsel, who allegedly is "fraternally and religiously linked" to the prosecutor, aided the prosecution by failing to: 1) present Henry's claim of erroneous denial of counsel by the City Court; 2) introduce certain evidence and call certain witnesses; 3) object to the presence of a particular person in the courtroom; and 4) present arguments that Rose exceeded his jurisdiction by arresting Henry in the convenience store parking lot, and that Henry was neither intoxicated nor driving or in physical control of an automobile at the time of the arrest. Henry's arguments, which we construe as a claim of ineffective assistance of counsel, are without merit.

This Court evaluates ineffective assistance of counsel claims under the two-prong test set forth in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. State v. Bradley (1993), 262 Mont. 194, 197, 864 P.2d 787 789. Under the first *Strickland* prong, "the defendant must prove that counsel's performance was deficient by establishing that it fell below the range of competence reasonably demanded of attorneys in light of the Sixth Amendment." *Bradley*, 864 P.2d at 789. "The second prong requires the defendant to demonstrate that counsel's deficiency was so prejudicial that it denied the defendant a fair trial." Bradley, 864 P.2d at 789. Both *Strickland* prongs must be established before we will conclude that a defendant received ineffective assistance of

counsel. State v. Hildreth (1994), 267 Mont. 423, 431-32, 884 P.2d 771, 776.

First, we address whether counsel's failure to raise Henry's claim of erroneous denial of counsel by the City Court on appeal to the District Court constituted deficient performance. A district court does not sit as a court of review on appeal from city court proceedings. *See City of Billings*, 863 P.2d at 445. Thus, counsel had no legal basis on which to present this claim of error by the City Court to the District Court; absent a legal basis, counsel's failure to present such an argument cannot constitute deficient performance. *See Bradley*, 864 P.2d at 790.

Nor are we persuaded by Henry's argument regarding counsel's failure to use a videotape and photographs of city limits and to call certain witnesses. Decisions relating to presentation of the case, including whether to introduce certain evidence or to present witnesses, generally are matters of trial tactics and strategy. *See, e.g.*, State v. Johnstone (1990), 244 Mont. 450, 464-65, 798 P.2d 978, 987. We will not find error supporting an ineffective assistance of counsel claim in counsel's tactical decisions. State v. Sheppard (Mont. 1995), 890 P.2d 754, 757, 52 St.Rep. 106, 108.

Henry also contends that counsel's performance was deficient because he failed to object to the presence, and alleged prejudicial effect, of a particular person in the courtroom. Here, we need observe only that the record before us is devoid of any reference to the presence of the person about whom Henry complains; Henry's contention is supported only by affidavits which are not part of the record on appeal. This Court's review of allegations

on direct appeal is confined to the record. Section 46-20-701, MCA; *Bradley*, 864 P.2d at 791. Thus, we decline to address this portion of Henry's argument.

Henry's allegation that counsel failed to argue that Rose did not have jurisdiction to arrest him is not supported by the record. Indeed, the record is clear that counsel filed a pretrial motion to dismiss the charges against Henry or, in the alternative, to suppress evidence seized at the time of Henry's arrest on this basis.

The record is equally clear regarding Henry's remaining assertions of deficient performance. In closing argument, counsel reminded the jury that the prosecution bore the burden of proving that Henry had committed the offense charged including the "under the influence" element. Counsel further drew the jury's attention to the prosecution's failure to provide any direct evidence of Henry's alleged intoxication and its total reliance on opinions provided by police officers and laypersons who observed Henry. Regarding whether Henry was driving or in actual physical control of a vehicle at the time of the arrest, counsel pointed out the inconsistencies in the testimony relating to that issue.

We conclude that Henry has not established that his counsel's performance was deficient under the first *Strickland* prong; for that reason, we need not address *Strickland's* prejudice prong. On the basis of the record before us, therefore, we hold that Henry was not denied the effective assistance of counsel during the District Court proceedings.

3. Did the District Court err in denying Henry's motion to dismiss or, in the alternative, to suppress evidence on the grounds that Rose was acting outside his lawful jurisdiction in arresting Henry?

Henry admits that his arrest occurred within the physical boundaries of Ole's convenience store parking lot, but contends that Ole's parking lot is located outside the town limits of Darby. Based on this contention, Henry argues that Rose had no jurisdiction to arrest him and, as a result, that the District Court erred in denying his motion to dismiss or, in the alternative, to suppress evidence.

Resolution of this issue turns on whether Ole's parking lot is within the Darby town limits. The record relating to the Darby town limits consists of Darby town plat, a copy of Darby Town Resolution 176, and an affidavit from Darby's mayor, Richard Higgins (Higgins). Henry highlighted the parcels of property containing Ole's parking lot on the town plat; it cannot be ascertained from reviewing the plat, however, whether the highlighted parcels are within the Darby town limits.

Higgin's affidavit states that on September 14, 1992, the Darby Town Council enacted Resolution 176 which annexed the property on which Ole's is located into the town limits. Resolution 176 states that, by mutual consent of the owner of the property, J.G.L. Distributing, Inc., and the Darby Town Council, "[p]roperty belonging to J.G.L. Distributing [is] annexed into the incorporated limits of the Town of Darby." Resolution 176 then sets forth the legal description of the two parcels of land being

annexed. A comparison of those legal descriptions to the parcels highlighted on the town plat reflects that the plat parcels are those annexed in the town limits of Darby via Resolution 176.

Henry cites to no evidence of record supporting the argument that Rose was without jurisdiction when he arrested Henry. Instead, he advances a convoluted argument that the prosecutor tampered with evidence in order to establish that Ole's parking lot was within the town limits, relying on a series of photographs and a home videotape which were not admitted into evidence at trial. We will not consider evidence not contained in the record on appeal. Section 46-20-701, MCA; *Bradley*, 864 P.2d at 791.

We conclude that the record establishes that Ole's parking lot, the site of Henry's arrest, lies within the Darby town limits and Rose's jurisdiction. Therefore, we hold that the District Court did not err in denying Henry's motion to dismiss the charges or, in the alternative, to suppress evidence.

4. Did the District Court err in ordering Henry to pay $10,550 as the costs of legal fees incurred by the Town of Darby in prosecuting his case?

The District Court sentenced Henry to sixty days in the Ravalli County Jail with thirty days suspended on certain conditions. The conditions included payment by Henry of a $500 fine, a $15 surcharge, costs of incarceration totalling $960, jury costs in the amount of $979.50, and $10,550 to the Town of Darby for legal fees incurred

in prosecuting Henry's case and any additional legal fees incurred in defending this appeal.

Henry argues that the costs and fines included in his sentence exceeded the average $350 fine imposed in similar cases prosecuted in Ravalli County; on that basis, he contends that the court's sentence was illegal. It appears that Henry also challenges the legal basis for the District Court's assessment of the prosecution legal fees as a condition of his suspended sentence.

"Trial judges are granted broad discretion to determine the appropriate punishment." State v. Hembd (1992), 254 Mont. 407, 411, 838 P.2d 412, 415. We do not review a sentence for inequity of disparity, but determine whether the sentence is within the statutory guidelines. *Hembd*, 838 P.2d at 415 (citations omitted). This Court will not disturb a district court's sentencing decision absent a showing that the court abused its discretion. State v. Blanchard (Mont. 1995), 889 P.2d 1180, 1182, 52 St.Rep. 54, 56.

Section 46-18-201, MCA, is the sentencing statute at issue here. Under subsection (1)(b), a court may suspend execution of a sentence for six months or for a period equal to the maximum sentence allowed, whichever is greater; during that period, the sentencing judge may impose any of the "reasonable restrictions or conditions" listed in subsection (1)(a). Section 46-18-201(1)(b) MCA.

The express statutory conditions contained in § 46-18-201(1)(a), MCA, and available for imposition as conditions of a suspended sentence under

§ 46-18-201(1)(b), MCA, include certain monetary obligations. For example, a defendant may be assessed restitution, costs of confinement, payment of a fine, and payment of certain costs. *See* § 46-18-201(1)(a)(iv), (v), (vi), and (vii), MCA. With the exception of the prosecution legal fees, it is clear that the fines and costs imposed by the District Court are specifically authorized as reasonable conditions of a suspended sentence pursuant to § 46-18-201(1)(a) and (b), MCA. It is equally clear that § 46-18-201(1)(a), MCA, does not specifically authorize the imposition of prosecution legal fees as a "reasonable condition" and, indeed, that no other statute provided express authority for the imposition of such a condition.

Moreover, the legislature's inclusion of specific authority for a court's imposition of the costs of court-appointed defense counsel (*see* § 46-18-201(1)(a)(viii), MCA) reflects the legislature's awareness of the means by which to provide for corresponding authority relating to prosecution legal fees. As a general rule, the express mention of a certain power or authority within a statute implies the exclusion of non-expressed powers. *See* State ex rel. Jones v. Giles (1975), 168 Mont. 130, 133, 541 P.2d 355, 357. Because the legislature expressly authorized the imposition of the costs of court-appointed defense counsel as a "reasonable condition" and did not provide for corresponding authority regarding prosecution legal fees, we conclude that the legislature did not intend to authorize the imposition of prosecution legal fees as a condition of a suspended sentence.

In addition to the express conditions set forth in § 46-18-201(1)(a)(i) through (xi), MCA, however, the "catch-all" provision contained in subsection (1)(a)(xii)

permits a sentencing court to impose "any other reasonable conditions considered necessary for rehabilitation. . . . " In imposing the condition regarding prosecution legal fees here, the District Court expressed the hope that, when Henry weighed the cost of his unlawful actions against the cost of engaging in those activities, he would "make some effort to conform [his] behavior to the law." At the same time, the court stated that there was no reasonable prospect of rehabilitation in Henry's case. Under these circumstances, it appears that the condition requiring Henry to reimburse Darby for its attorney fees more probably reflects the court's understandable frustration with Henry than a condition imposed for rehabilitation purposes pursuant to § 46-18-201(1)(a)(xii), MCA. Moreover, absent express statutory authority, the imposition of prosecution legal fees engenders a sense of a primarily punitive, rather than rehabilitative, purpose.

District courts are vested with considerable discretionary power regarding sentences. *Hembd*, 838 P.2d at 415. We conclude, however, that the imposition of prosecution legal fees is neither expressly nor implicitly authorized by § 46-18-201(1)(a), MCA. On that basis, we hold that the District Court abused its discretion in imposing the payment of prosecution legal fees as a condition of Henry's suspended sentence.

Affirmed in part, reversed in part, and remanded for resentencing.

/s/ Karla M. Gray
Justice

We concur:

/s/ –

/s/ William Hunth

/s/ Terry Triweiler

/s/ W. William –
Justices

APPENDIX B

HON. JEFFREY H. LANGTON
District Judge
Twenty-First Judicial District
Ravalli County Courthouse Box 5012
Hamilton, Montana 59840
(406) 363-3412

FILED:
JUN 29 1994

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,

RAVALLI COUNTY

STATE OF MONTANA, TOWN OF DARBY, Plaintiffs, vs. STEVEN J. HENRY, Defendant.	CAUSE NO. CR-94-27

OPINION AND ORDER

This case is before the Court on the Defendant's motion to dismiss the charge of driving under the influence in violation of § 61-8-401, M.C.A., or, in the alternative, that the evidence seized and gathered as a result of the Defendant's arrest be suppressed and excluded from the District Court trial of the action, on the grounds that Defendant was unlawfully arrested by a peace officer acting outside his lawful jurisdiction.

FACTS

The essential facts appear to be as follows:

On the afternoon of August 25, 1993, the Ravalli County Sheriff's office dispatcher received an anonymous call reporting a possible D.U.I. suspect, Mr. Steve Henry, Driving a red and white Dodge Ram truck with a "13-" (Ravalli County) license plate northbound on the West Fork Road. The West Fork Road runs north to an intersection with U.S. Highway 93. Proceeding north about four miles on U.S. Highway 93 a motorist would pass through the incorporated town of Darby, Montana.

The dispatcher relayed the report to Darby town marshall Larry Rose. Marshall Rose proceeded in his police cruiser south of the Darby town limits about 3/4 of a mile where he stopped and parked near Highway 93 to wait for the suspect.

Some time thereafter Henry passed the place officer Rose was parked in his red and white Dodge Ram truck. Rose testified in the city court trial that he followed the Defendant and observed the Henry vehicle weave outside both sides of his lane of traffic. In Marshall Rose's typewritten report he stated that, "I turned on my emergency flashers, just before he pulled into Ole's parking area." In his testimony in the Darby city court trial officer Rose testified that " . . . just as it (the Henry vehicle) pulled into Ole's, I pulled in behind and turned on my emergency flashers. I as right there behind him."

Ole's is a convenience store-gas station located on about three acres of real property owned by J.G.L. Distributing, Inc. It is and has been within the Darby town

limits since September 14, 1992. Adjacent to and southeast of the J.G.L. Distributing land is a parcel owned by master Log Homes, Inc., with 197 feet of highway frontage. It appears this property is and at all relevant times was also located inside the Darby town limits, according to records of the Ravalli County Clerk & Recorder. It also appears undisputed that the width of the U.S. Highway 93 right-of-way throughout the area in issue is outside, but adjacent to, the town limits of Darby.

Consequently, it appears certain that Marshall Rose made his initial observations of erratic driving outside the town and that when officer Rose turned on his emergency flashers he may have been just outside the town limits on Highway 93. In any event, Defendant pulled off the highway onto the Ole's store property which is inside the town. Once Henry had stopped, Marshall Rose stopped behind him, exited the patrol car and made certain observations and inquiries, during which time an off-duty Montana Highway Patrolman stopped to assist. This traffic stop culminated in officer Rose placing the Defendant under arrest for D.U.I., after which he transported Defendant to the Ravalli County Sheriff's office for booking. A search of the vehicle incident to Defendant's arrest produced a nearly empty 40-oz. bottle of "Olde English" malt liquor.

LAW

Montana recognizes the well-established general rule that a law enforcement officer acting outside his jurisdiction without an arrest warrant may not make arrests

except under circumstances which would authorize a private citizen to make an arrest. *State v. McDole,* 226 Mont. 169, 172, 734 P.2d 683 (1987). Here, the town of Darby, as of the date of this arrest, apparently had not adopted an ordinance authorizing its city officers to make arrests within five miles of the city limits as authorizes [sic] by § 7-32-4301, M.C.A. Thus, if the arrest was made outside the town limits *McDole, supra,* and its progeny control. However, if the arrest was made within the town of Darby, they do not.

The defense appears to argue that the arrest occurred in this case when officer Rose turned on his emergency flashers while he may have been just outside the town limits, indeed within a few feet of the town limits at most. The Court does not agree.

The Defendant fails to appreciate the distinction between an investigative detention and an arrest. When a peace officer has probably [sic] cause, or at least an articulable and reasonable suspicion, that a traffic violation has occurred, he has the authority to stop the vehicle and question the driver and order the driver to exit the vehicle. *Pennsylvania v. Mimm,* 434 U.S. 106 (1977). *Delaware v. Prouse,* 440 U.S. 648 (1979). During such a stop, the police have the authority to demand and inspect the driver's vehicle registration, driver's license, and vehicle identification number. *New York v. Class,* 475 U.S. 106 (1986). The distinction between this type of an investigative detention and an arrest have long been recognized. *Terry v. Ohio,* 392 U.S. 1 (1968). *Michigan v. Long,* 463 U.S. 1032 (1983). A warrantless arrest is effected by actual restraint of the person of the accused or by an announcement that the accused in under arrest accompanied by a

show of force and authority upon probable cause to believe that an offense is being or has been committed by the accused and that existing circumstances require an immediate arrest. §§ 46-16-311 and 46-6-104, M.C.A. 1 Wharton's Criminal procedure § 51 (13th Ed., 1989).

The Court concludes that the Defendant was not placed under arrest outside Darby under any circumstances. While the first step of a traffic stop investigative detention may have been initiated at or near the boundary of the Darby town limits, it too did not rise to the level of a detention until the two vehicles came to rest within the town limits. In essence then, the only substantive activity by Marshall Rose outside the town was his investigative observations, which he was privileged to make the same as any other private citizen. The Court knows of no precedent for the proposition that a peace officer needs statutory authority to gather and observe suspicious or overtly criminal activity outside his jurisdiction. The fact that officer Rose partially gathered the information giving rise to the articulable and reasonable suspicion that Defendant was violating the traffic laws outside the town limits did not prevent him from initiating an investigative stop at or very near the exterior boundaries of the town, culminating in a completed investigative stop and an arrest within the town. Since no arrest was made in this case outside of the town limits of Darby, the Court declines to address that issue.

Accordingly, the Defendant's motion to dismiss or suppress on grounds of illegal arrest in DENIED.

DATED this 29th day of June, 1994.

/s/ Jeffrey H. Langton
DISTRICT JUDGE

cc: Charles H. Recht, Esq.
Howard C. Greenwood, Esq.

APPENDIX C

IN THE CITY COURT, TOWN OF DARBY,
RAVALLI COUNTY, STATE OF MONTANA,
BEFORE JUDGE MARTHA A. BETHEL

TOWN OF DARBY,
STATE OF MONTANA,
Plaintiff,

vs.

STEVEN J. HENRY,
Defendant.
DOB: 04/12/55

ORDER/SENTENCE/DUI
Case No.: 93-0291

THE ABOVE-NAMED DEFENDANT having been convicted by a jury of his peers this date on the charge of OPERATING A MOTOR WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, (1st OFFENSE), in violation of 61-8-401, M.C.A., a misdemeanor charge committed on 8-25-93; Defendant Henry is this date pronounced guilty and is sentenced to the following:

IT IS ORDERED:

1) Defendant is assessed:

	FINES:	JAIL TIME:
DUI (1st):	$500.00/-0-ss	60/30ss
SURCHARGES:	15.00	
COSTS/JAIL:	960.00	
ATTORNEY'S FEES:	N/A_____	

JURY COSTS: 298.32

ACT: MUST BE COMPLETED WITHIN 45 DAYS OF DATE OF CONVICTION (through CROSS-ROADS)

2) The suspensions stipulated above will remain suspended on the condition that:

a) Defendant receives no further convictions of federal, state or municipal law during the next six (6) months.

b) Defendant pays fines and costs as listed above.

c) That Defendant attend, pay for and complete the ACT program within the time limitations set out by state law, and to comply with any recommendations for treatment that are made at the exit interview.

d) Defendant agrees that, in lieu of serving the entire 30 days of suspended jail time which is held over him for as long as this Court retains jurisdiction over this sentence, he will abstain from alcohol, will not go into bars or establishments selling alcohol over the counter, and will agree to submit to a chemical test upon demand by law enforcement or by order of this Court. Refusal of such test shall constitute a CONTEMPT under 3-11-303, M.C.A., and may cause proceedings to revoke the balance of unserved jail sentence and/or fines.

e) _____

_____

_____

_____

_____

VIOLATION OF ANY OF THE ABOVE RESTRICTIONS SHALL CONSTITUTE CONTEMPT OF COURT, 45-7-309, M.C.A., AND MAY CAUSE INITIATION OF A COURT ACTION FOR REVOCATION OF THE SUSPENDED PORTION OF JAIL TIME AND/OR FINES.

/s/ MB — 3/2/94

JUDGE MARTHA A. BETHEL — date

(mailed 9th from Helena rec'd 11th)

APPENDIX D

HON. JEFFREY H. LANGTON
District Judge
Twenty-First Judicial District
Ravalli County Courthouse Box 5012
Hamilton, Montana 59840
(406) 363-3412

MONTANA TWENTY-FIRST JUDICIAL
DISTRICT COURT,
RAVALLI COUNTY

STATE OF MONTANA, TOWN OF DARBY, Plaintiffs, vs. STEVEN J. HENRY, Defendant.	CAUSE NO. CR-94-27 **ORDER** (FILED: AUG 04 1995)

The Court having received Remittitur in this case from the Montana Supreme Court,

IT IS ORDERED that the Defendant, Steven J. Henry, personally appear before this Court on Wednesday, the 16th day of August, 1995, at 10:00 a.m., for purposes of dissolution of the stay of execution of the Defendant's judgment of conviction and implementation of the Court's sentence as adjusted by the Montana Supreme Court.

DATED this 3rd day of August, 1995.

/s/ Jeffrey H. Langton
JEFFREY H. LANGTON,
District Judge

cc: Charles H. Recht, Esq.
Steven J. Henry, *pro se*, via certified mail
OPINION AND ORDER

APPENDIX E

IN THE SUPREME COURT
STATE OF MONTANA

State of Montana, Town of Darby, Plaintiffs vs. Steven J. Henry, Defendant	)	SC Case No. 94-400 NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

COMES NOW the Defendant in this case to appeal the decision of the Montana Supreme Court to the United States Supreme Court in Washington, D.C. on a writ of certiorari as prescribed by that Court.

Respectfully submitted this 18 day of July 1995.

/s/ Steven J. Henry
STEVEN J. HENRY

NOTICE OF APPEAL

IN THE SUPREME COURT
STATE OF MONTANA

STATE OF MONTANA, TOWN OF DARBY, Plaintiff and Respondent, v. STEVEN J. HENRY, Defendant and Appellant.	)	ORDER (Filed Jul. 13, 1995)

Steven J. Henry has filed a Motion to Reconsider Appeal, which we deem a Petition for Rehearing.

IT IS ORDERED that the Petition for Rehearing is DENIED.

The Clerk is directed to mail a true copy hereof to Steven J. Henry, personally and to counsel of record for the State and the Town of Darby.

DATED this 13th day of July, 1995

/s/ William Hunth

/s/ Karla M. Gray

/s/ Terry Treweiler

/s/ –

Justices

APPENDIX F

IN THE SUPREME COURT
STATE OF MONTANA

State of Montana, Town of Darby, Plaintiffs vs. Steven J. Henry, Defendant	)))))))))	Case No. 94-400 MOTION TO STAY EXECUTION OF SENTENCE

COMES NOW the Defendant, STEVEN J. HENRY to move that the Court stay execution of sentence of the lower Court pending appeal to the United States Supreme Court in the form of a writ of certiorari.

Respectfully submitted this 18 day of July 1995.

/s/ Steven J. Henry
STEVEN J. HENRY